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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

A & P STEEL, INC.,

Petitioner,

v.

ROSEBUD SIOUX TRIBE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In an action where jurisdiction is premised on diversity of citizenship, may the Court of Appeals apply federal common law to the effect that a corporate defendant is strictly liable to an Indian tribe for the alleged fraud of a corporate agent acting adversely to the corporate interests and with an independent purpose of his own when the law of the state in which the trial occurred is to the contrary?

II. Where a non-party witness refuses to answer questions based upon his Fifth Amendment privilege against self-incrimination, should a party be permitted to draw an inference of wrongdoing against the opposing party?

PARTIES

A Complaint was served against petitioner herein by Charles Colombe, Alvin Blacksmith, Lois Long and Jake Antoine, for themselves individually and on behalf of all other member of the Rosebud Sioux Tribe. The Rosebud Sioux Tribe was later added as a party plaintiff on July 9, 1980. Only the Rosebud Sioux Tribe appealed to the Eighth Circuit Court of Appeals.

Petitioner is a corporation organized under the laws of Colorado and doing business in that state.

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OPINIONS BELOW

The Eighth Circuit Court of Appeals filed an Opinion on April 25, 1984 in Appeals No. 83-1748, 82-2187, 82-2217 in the action known as *Rosebud Sioux Tribe, Appellant* v. *A & P Steel, Inc., Appellee.* A copy of this Opinion is attached as Appendix 4. The Opinion from the Eighth Circuit Court of Appeals concerned an appeal from a judgment, after jury trial, against Rosebud Sioux Tribe filed the 27th day of August, 1982, a denial of their motion for new trial dated September 10, 1982 and a denial of their motion pursuant to Federal Rule of Civil Procedure 60(b) to vacate the judgment dated May 16, 1983. The district court entered a lengthy order, which included citation of authority, upon denying Rosebud Sioux Tribe's motion to vacate the judgment (Appendix 3).

GROUNDS FOR JURISDICTION

The Opinion of the Eighth Circuit Court of Appeals was filed April 25, 1984. In a timely fashion, a petition for rehearing or rehearing en banc was filed and later denied on June 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In pertinent part, the United States Constitution, Amendment V, provides "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

Several rules contained in the Federal Rules of Evidence are involved in the instant case, as follow:

> Rule 102, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained in proceedings justly determined."
>
> Rule 501, "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, a person, government, state or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . ."
>
> Rule 804(a)(1), " 'Unavailability as a witness' includes situations in which the declarant is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; . . . ."

Rule 804(b)(1), "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motives to develop the testimony by direct, cross, or re-direct examination."

Rule 1101(b), "These rules apply generally to civil actions and proceedings, . . . to criminal cases and proceedings, ..."

Rule 1101(c), "The rule with respect to privileges applies at all stages of all actions, cases and proceedings."

STATEMENT OF THE CASE

Originally, the plaintiffs included Charles Colombe, Alvin Blacksmith, Lois Long and Jake Antoine, for themselves individually, and on behalf of all members of the Rosebud Sioux Tribe. The Rosebud Sioux Tribe itself was added as a party plaintiff July 9, 1980 and eventually became the sole appellant from an adverse jury verdict. They brought an action for damages for fraud, negligence, breach of warranty and breach of contract against A & P Steel, Inc. arising out of a sale of irrigation equipment and accessories to the Rosebud Sioux Tribe. A & P Steel, Inc. (hereinafter A & P) counterclaimed for the Rosebud Sioux Tribe's, (hereinafter Tribe) breach of contract. A jury returned a verdict for A & P on the Tribe's claims and on A & P's counterclaim. Jurisdiction was premised upon 25 U.S.C.A. 477 and 28 U.S.C. 1332.

The Tribe appealed from the judgment rendered pursuant to the jury's verdict. Thereafter, the Tribe moved

to vacate the judgment pursuant to Federal Rule of Civil Procedure 60(b) alleging that new evidence had been discovered. The district court denied the Tribe's motion, who then appealed this decision to the Eighth Circuit Court of Appeals.

In 1977, the Tribe applied for a grant to build an irrigation system. Edward Driving Hawk (hereinafter Driving Hawk), the tribal chairman, contacted Michael Strain (hereinafter Strain) to prepare, write and present the application. At that time, Strain was the lawyer for Tribal Land Enterprises (hereinafter TLE), a tribal subsidiary responsible for administration of all lands owned by the Tribe or held in trust (TR. 13). The application was accepted and the funds were awarded. Strain was asked to recommend a company which might supply and install the irrigation systems.

Strain first recommended Northern Farm Supply (Strain, Depo. 14). (Strain's deposition was read into evidence at trial (TR. 2433)). Northern Farm Supply was unable to procure a bond. Consequently, the Tribe could not accept its bid (Strain, Depo. 23-24, 25). Western Irrigation of Custer was contacted, but, like Northern Farm Supply, was unable to procure the bond and its bid was not accepted (Strain, Depo. 19). Eventually, Dan McPherson (hereinafter McPherson), a corporate officer of A & P, suggested that A & P might assume Northern Farm Supply's proposal (Strain, Depo. 21-22).

McPherson was told by Richard Lone Dog (hereinafter Lone Dog), an officer of the tribal subsidiary TLE, that if A & P could get the bond, they would get the job (McPherson, Depo. 39). (McPherson's deposition was read into evidence at trial (TR. 2438)). Strain was TLE's attorney and a close personal friend of Lone Dog.

The Tribe accepted A & P's proposal. Sometime thereafter, Tom Pearce (hereinafter Pearce), A & P's corporate president, became concerned over rumors that it was difficult to receive payment for work done for the Tribe. He mentioned his concern to McPherson, who then contacted Strain. Strain recommended that A & P acquire a local representative who was familiar with tribal government and the Bureau of Indian Affairs. McPherson relayed the recommendation to Tom Pearce (McPherson, Depo. 46).

Sometime thereafter, Strain, Driving Hawk and Lone Dog formed a dummy corporation known as Frontrunner, Inc. (hereinafter Frontrunner). McPherson recommended that A & P hire Frontrunner. Consistent with the normal course of business at A & P, Pearce simply followed McPherson's recommendation (McPherson, Depo. 151). Pearce never discussed these matters with Strain, Driving Hawk, or Lone Dog (Strain, Depo. 53).

McPherson, approved all payments made to Frontrunner by A & P (McPherson, Depo. 125). In turn, Frontrunner made payments to Driving Hawk and Lone Dog, ostensibly, for services, supplies, work, stud fees, etc. (TR. 847-54, 862-69, 1136-52).

McPherson and Strain grew closer. They traveled to Palm Springs (Strain, Depo. 61-62). Both invested in Lamco, a solar energy corporation. Strain first purchased $15,000 of stock. Later, McPherson purchased it from Strain for $27,000 (McPherson, Depo. 67). No one at A & P had any knowledge of these dealings other than McPherson (TR. 942).

Pearce discovered that McPherson had lied to him. Additionally, he learned that Strain and McPherson were involved together in Lamco (TR. 1301). Futhermore,

Pearce ascertained that A & P was losing money on the irrigation project (McPherson, Depo. 87-91). Pearce also unearthed that McPherson had presented a false voucher to A & P's accountant (TR. 1336). Finally, Pearce became aware that McPherson had paid Frontrunner in excess of the agreed consultant fee (TR. 1336). Pearce fired McPherson.

As the circuit court indicated, Frontrunner received over $173,000. TLE paid Strain about $50,000 (TR. 1108-1109). McPherson received about $23,000 as a result of the contract (McPherson, Depo. 91). In contrast, A & P lost in excess of $100,000 on the project (TR. 1300-1301, 1383, 2550). Any profit was siphoned from the corporation by McPherson into various dealings in which McPherson, Driving Hawk, Strain and Lone Dog were involved.

During trial, A & P proposed to call Lone Dog as a witness. Both parties were aware that Lone Dog intended to assert his Fifth Amendment privilege against self-incrimination. He refused to answer questions (TR. 2926-2927). During an in-chambers' hearing, the district court determined that Lone Dog properly invoked his privilege and pursuant to Federal Rule of Evidence 804, *United States* v. *Zurosky*, 614 F.2d 779 (8th Cir. 1979), and *Witham* v. *Mabry*, 596 F.2d 293 (8th Cir. 1979) found him to be an unavailable witness. Consequently, he permitted A & P to read Lone Dog's deposition into evidence under Federal Rule of Evidence 804(b)(1). Although the Tribe counsel had attended the deposition and participated, he asked the district court's permission to call Lone Dog to the stand and have him assert his privilege in the jury's presence. The district court refused.

At no time did A & P make any direct payments to Lone Dog or Driving Hawk. Similarly, McPherson personally

oversaw all payments to Strain. Without a doubt, Lone Dog was not an agent of A & P. Moreover, the evidence suggests that McPherson, Strain and Lone Dog collaborated to defraud A & P. The jury returned a verdict for A & P on plaintiff's claim that A & P had conspired to defraud the Tribe. The court of appeals reversed holding, in part, that the district court erroneously, as a matter of law, instructed the jury that if it found that a corporate agent was acting adversely to the interests of A & P, A & P could not be charged with that agent's knowledge. Additionally, the court of appeals ruled that the district court erred in the handling of Lone Dog's testimony. The appellate court held that Lone Dog's invocation of the Fifth Amendment privilege against self-incrimination should have been made in the jury's presence and that the Tribe should be permitted to draw an inference of illegal activity against A & P based on Lone Dog's assertion of the privilege.

REASONS FOR ALLOWANCE OF WRIT

1. The court of appeal's holding that the district court erroneously, as a matter of law, instructed the jury, while relying entirely upon federal common law, has rendered a decision in conflict with the decisions of other federal courts of appeal and this Court on the same matter, and has departed from the accepted and usual course of judicial proceedings by avoiding the holding of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

2. By holding that a *non-party witness must* take the stand, assert his Fifth Amendment privilege against self-incrimination in the jury's presence and that a *party* may draw an inference of wrongdoing against the *opposing party* based on this assertion of the privilege, the court of appeals has decided an important question of federal

evidentiary law which has not been, but should be, settled by this Court and/or has decided that federal question in a way which conflicts with applicable decisions of this Court.

ARGUMENT AND AUTHORITIES

I. The Circuit Court Departed From The Rule Of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) When It Created Common Law To The Effect That A Corporate Defendant Is Strictly Liable To An Indian Tribe For The Fraud Of A Corporate Agent Acting Adversely To The Corporate Interest And For His Own Independent Profit When The Law Of The State In Which The District Court Tried The Action Is To The Contrary.

The district court instructed the jury as follows:

> An act of an officer, agent or employee of a corporation done to effect some independent purpose of his own is not within the scope of his employment and accordingly the corporation will not be charged with notice of facts of which an officer, agent or employee acquires knowledge of while acting in a transaction in which he is interested, either for himself or for another, adversely to the corporation.

The circuit court held, "this instruction is erroneous, as a matter of law." *Rosebud Sioux Tribe* v. *A & P Steel, Inc.*, Slip. Op. No. 83-1748; 83-2187; 82-2217 at 15 (8th Cir., April 25, 1984). By so holding, the circuit court held corporations strictly liable for the fraudulent acts of their agents even though the corporation had no knowledge of the acts and the agent was acting for an independent and personal benefit, adversely to the interests of the corporation. *Id.*, 16-17.

Recently, Justice O'Connor reminded courts that the holding of *Erie R. Co.* v. *Tompkins, supra*, "denied the federal government the power to create substantive law solely by virtue of Article III, ..." *Southland Corp.* v. *Keating*, ___ U.S. ___, 104 S.Ct. 852, ___ L.Ed.2d

___ (1984); *See, also, Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 100 S.Ct. 1979, 64 L.Ed.2d 659 (1980). In our federal system, the courts should never forget that the constitution "recognizes and preserves the autonomy and independency of the states,—independence in their legislative and independence in their judicial departments." *Erie R. Co.* v. *Tompkins*, 304 U.S. at 78-79, 58 S.Ct. at 822, quoting *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U.S. 368, 401, 37 L.Ed. 772 (1893) (Field, J., dissenting); *Rummel* v. *Estelle*, 445 U.S. 263, 303, 100 S.Ct. 1133, 1154, 63 L.Ed.2d 382 (1980) (Stewart, J., concurring). Claims of fraud require federal courts exercising diversity jurisdiction to apply state substantive law. *See, Prima Paint Corp.* v. *Conklin Mfg., Co.*, 338 U.S. 395, 406, 87 S.Ct. 1801, 1807, 18 L.Ed.2d 1270 (1967). Consequently, there is no federal common law of fraud which can be applied by federal courts to the instant action.

Plaintiff sued in Federal District Court, District of South Dakota. The substantive law of South Dakota, however, was not applied by the court of appeals. Instead, by creating federal common law, that court effectively offers plaintiffs substantive loss contrary to the law of South Dakota.

Generally, the rule in South Dakota is that the acts of an employee which are adverse to corporate interests or which further some independent purpose of his own are not within the scope of his employment. *United States* v. *Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952); *Morman* v. *Wagner*, 262 N.W. 78, 79 (S.D. 1935); *Waaler* v. *Great Northern Ry. Co.*, 117 N.W. 140 (S.D. 1908); *Waaler* v. *Great Northern Ry. Co.*, 100 N.W. 1097 (S.D. 1904); *Antonen* v. *Swanson*, 48 N.W.2d 161 (S.D. 1951). In South Dakota, a jury may exonerate the employer if it decides that the agent is acting outside the scope of employment, adversely to the employer's interest.

Other courts have suggested that this rule applies only to "conventional" ports. *Hydro-Level Corp.* v. *Am. Soc. of Mech. Engineers*, 635 F.2d 118, 125 (2d Cir. 1980), affirmed, 456 U.S. 556 (1981) (antitrust violations). Justices White and Rhenquist dissented in *Am. Soc. of Mech Eng'rs.* v. *Hydro-Level Corp.*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982), noting that "It was far from clear that a principal could be held liable for the deliberate torts of his agent." *Id.*, at 1953 n.13. South Dakota courts have held that in cases of fraud and misrepresentation a purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment. *See, e.g., Bourk* v. *Iseman Mobile Homes, Etc.*, 316 N.W.2d 343 (S.D. 1982); *See, also, Burke* v. *Thomas Chevrolet*, 227 N.W.2d 31 (S.D. 1975); *Rasmussen* v. *Reedy*, 84 N.W. 205 (S.D. 1900).

In *Bourk*, 316 N.W.2d at 343, the plaintiffs appealed a grant of summary judgment against their claims of fraud. The South Dakota Supreme Court reversed because there were issues of fact, noting:

> [Defendant's] affidavit and its supporting depositions are devoid of facts showing that its agent was not acting in furtherance of [defendant's] business when the mobile home was sold to [plaintiffs].

Id., at 344.

Similarly, the Eighth Circuit Court of Appeals has recognized that an agent committing a fraud for his own personal benefit does not act within the scope of his employ. *Farm Bureau Co-op, Mill & Supply* v. *Blue Star Foods*, 238 F.2d 326, 335 (8th Cir. 1956). In that case, the Court was concerned with the fraudulent conversion of chickens which had been purchased by the defendant's employee with an insufficient funds check. The Court held that even if the perpetrator was found to be an agent

of defendant, "it could *not* be held that the committing of a fraud for his own personal benefit was in the scope of his agency." *Id.*, at 335 (emphasis added). "Where an agent though ostensibly acting in the business of the principal, is really committing a fraud for his own benefit, he is acting outside of the scope of his agency." *Ibid.*, at 335, quoting *Thompson Houston Electric Co.* v. *Capitol Electric Co.*, 65 F. 341, 343 (6th Cir.); *See, Fargo Nat. Bank* v. *Agricultural Ins. Co.*, 184 F.2d 676 (8th Cir. 1950); *Myzel* v. *Fields*, 386 F.2d 718, 750 (8th Cir. 1967) (corporation is bound by agent's deceit only if the agent is "acting on behalf of the corporation."). The instruction given by the district court is a correct statement of law.

The circuit court ruled that the instruction was erroneous as a matter of law. In so ruling it did not rely upon or consider the law of South Dakota. *Myzel* v. *Fields*, *Id.*, at 738, concerned federal law existing under the Securities Exchange Act and the liability was not governed by principles of agency or conspiracy. *Southern Pac. Transp. Co.* v. *Continental Shippers*, 485 F.Supp. 1313, 1316 (W.D. Mo. 1980) involved Interstate Commerce Commission rulings in light of general principles of agency law. *Weaver* v. *Metropolitan Insurance Co.*, 545 F.Supp. 74 (E.D. Mo. 1982) applied Missouri law. *United States* v. *Johnson*, 541 F.2d 719 (8th Cir. 1976), cert. denied, 429 U.S. 1093 (1977) concerned the violation of a federal trade commission contempt order. The only South Dakota case cited by the panel was *Karlen* v. *Ray E. Friedman & Co. Commodities*, 688 F.2d 1193 (8th Cir. 1982). That case, however, did not refer to any South Dakota authority. It relied upon the general law concerning *respondeat superior* as affected by the Commodity Exchange Act.

Contrary to the settled law of this Court, whereby federal courts exercising diversity jurisdiction are pre-

cluded from creating federal common law and *must* apply the law of the state in which they sit, the Eighth Circuit Court of Appeals relied exclusively upon federal law, general principles of agency, or the law of Missouri, not the law of South Dakota. Under the law of South Dakota, the district court correctly instructed the jury that the knowledge of an agent who acts adversely to corporate interests cannot be imputed to the corporation. Consequently, the Eighth Circuit Court of Appeals in reversing the district court ruled contrary to the settled law of this Court and deviated from the accepted practice of the courts.

II. A Party Should Not Be Permitted To Draw An Adverse Inference Against A Corporate Party Based On A Non-Party Witness' Invocation Of His Fifth Amendment Privilege Against Self-Incrimination.

At trial A & P proposed to call Lone Dog as a witness. All parties knew that Lone Dog intended to invoke the Fifth Amendment. In accordance with *Holt* v. *Wyrick*, 649 F.2d 543, 548 (8th Cir. 1981) cert. denied, 454 U.S. 1143 (1982) and *Witham* v. *Mabry*, 596 F.2d 293, (8th Cir. 1979), the district court found Lone Dog was unavailable under Federal Rule of Evidence 804(a)(1) and permitted A & P to read Lone Dog's deposition into evidence.

Based upon this Court's decision in *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), *Brinks, Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983) and Heidt, *The Conjurers Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062 (1982), the court of appeals ruled that to preserve fairness in a civil proceeding a non-party witness like Lone Dog *must* be called to the stand, invoke the privilege against self-incrimination in the jury's presence so that counsel for the Tribe could ask the jury to draw an inference of

wrong-doing against A & P. The ruling extends this Court's decision in *Baxter, supra*, beyond its holding contrary to this Court's precedent and the decisions of other courts of appeal and undermines the purpose, effect and lanaguage of the Federal Rules of Evidence.

Baxter v. *Palmigiano*, 425 U.S. at 308, 96 S.Ct. at 1551, considered a prison inmate's invocation of the Fifth Amendment privilege against self-incrimination during a prison disciplinary hearing in which the inmate was a direct party defendant. Before the hearing the prison board instructed the inmate "that he had a right to remain silent during the hearing but that if he remained silent his silence would be held against him." *Id.*, 425 U.S. at 312, 96 S.Ct. at 1555. After finding that a prison disciplinary hearing was a civil hearing this Court noted:

> As the court has often held, the fifth amendment 'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'

Id., 425 U.S. at 316, 96 S.Ct. at 1557, quoting *Lefkowitz* v. *Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 332, 38 L.Ed.2d 274, 281 (1973). This Court held that under the circumstances an adverse inference of wrongdoing could be drawn from a *party's* invocation of the Fifth Amendment. Justices Brennan and Marshall dissented because this Court "has repeatedly emphasized that such an inference has no foundation." *Ibid*, 425 U.S. at 336, 96 S.Ct. at 1567.

The Second Circuit considered a situation similar to *Baxter, supra*, in *Brinks, Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983). There, the city sued Brinks for

negligence and breach of contract arising out of the pilferage of coins from city parking meters by Brinks' former employees. The former employees were made third party defendants by Brinks. Several of the third party defendants exercised their Fifth Amendment privilege and refused to answer questions concerning the theft.

The city relied upon the assertion of this privilege as circumstantial evidence in support of its claim against Brinks. Moreover, the Court instructed the jury that, "a witness has a constitutional right to decline to answer on the ground that it may tend to incriminate him. However, you may, but need not, infer by such refusal that the answers would have been adverse to the witness' interests." *Id.*, at 707.

Unlike the instant case, Brinks did not know that the third party defendants would invoke the Fifth Amendment privilege. The Second Circuit noted, "the propriety of calling witnesses who intend to assert a Fifth Amendment privilege not to testify poses a difficult question, and one upon which the courts and commentators have taken different positions." *Id.*, at 708.

The instant case presents the "difficult question" reserved in Brinks and whether the court of appeals properly held that *Baxter, supra*, permits the Tribe to draw an inference of wrongdoing against A & P based on the silence of a *non-party witness who was not the agent of A & P*. As the issue itself demonstrates, the court of appeals extended *Baxter, supra*, beyond the specific circumstances of that case despite this Court's admonition that *Baxter*, was limited to the facts there presented. *Baxter*, 425 U.S. at 320, 96 S.Ct. at 1559. No question concerning the propriety of Lone Dog's assertion of the privilege is raised.

The method and procedure concerning a non-party's invocation of the Fifth Amendment is a matter for this Court's judgment.

> In . . . enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.' . . .

Trammel v. *United States*, 445 U.S. 40, 47 100 S.Ct. 906, 63 L.Ed.2d 186 (1980); F.R.Evid. 501. Evidentiary rules are to be construed to secure fairness in administration to the end that the truth may be ascertained and proceedings justly determined. F.R.Evid. 102. A procedure is not unfair simply because the result is perceived as unfair. *United States* v. *Augenbilck*, 393 U.S. 348, 352, 89 S.Ct. 528, 532, 21 L.Ed.2d 537 (1969). "In civil cases involving only parties . . . the more pertinent question, . . . is how to assure that the privilege is not applied so as to give one citizen an unfair advantage over his fellow citizen." Kaminsky, *Preventing Unfair use of the Privilege Against Self-incrimination in Private Civil Litigation: A Critical Analysis*, 120 Brooklyn L. Rev. 121, 127-128 (1972).

In the interest of fairness, generally courts have granted sanctions against a defendant who invokes the privilege. The opposing party has been allowed to comment on the use of the privilege, and the great majority of courts have permitted an adverse inference to be drawn. Note, *Use of the Privilege Against Self-incrimination in Civil Litigation*, 52 Va. L. Rev. 322, 331 (1966). Such is not the case when a non-party witness exercises his privilege.

Most decisions which consider what effect should be given to a non-party witness' privilege against self-

incrimination are criminal cases. The rules of evidence and privileges, however, apply equally to both a criminal trial and a civil trial. F.R. Evid. 1101(b), (c). Moreover, the dictates of "fairness" arising out of a claimed privilege in either a civil or criminal trial are identical. We ask this Court to grant our petition to settle this issue of federal evidence.

Federal appellate courts faced with a witness claiming the Fifth Amendment have held that "it is well settled that the jury is *not* entitled to draw any inferences from the decision of a *witness* to exercise his constitutional privilege whether those inferences be favorable to the prosecution or the defendant." *Bowles* v. *United States*, 439 F.2d 536, 541 (D.C.Cir. 1970) cert. denied, 401 U.S. 995; *United States* v. *Nunez*, 668 F.2d 1116, 1123 (10th Cir. 1981); *United States* v. *Vandetti*, 623 F.2d 1144, 1148 (6th Cir. 1980); *United States* v. *Harris*, 542 F.2d 1283, 1298 (7th Cir. 1976); *United States* v. *LaCouture*, 495 F.2d 1237, 1240 (5th Cir. 1974), cert. denied, 419 U.S. 1053; *United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973). Moreover, most of these cases approved the practice of holding an in-chambers' hearing on the issue. Finally, each of these cases, in part, relied upon this Court's decision in *Namet* v. *United States*, 373 U.S. 179, 190-91, 83 S.Ct. 1151, 1156-57, 10 L.Ed.2d 278 (1963).

In *Namet*, *Id.*, this Court granted certiorari to consider whether a trial court acted properly where "the prosecutor was permitted to ask two witnesses incriminating questions concerning their relationship with the [defendant], with the knowledge that the witnesses would invoke their privilege against self-incrimination." *Id.*, 373 U.S. at 180, 83 S.Ct. at 1151. This Court held that the trial court had erred. Because no prejudice arose from the error, the case was not reversed.

The defendant was charged with operating a small gambling ring in *Namet, supra*. In operating the ring, he would use several neighborhood grocery stores as collection points for the betting receipts and to pay winning bets. The witnesses who invoked the privilege against self-incrimination operated one of these stores. One of the key issues which developed during the case was whether the places regularly visited by the defendant were known gambling establishments. The prosecution sought to establish this evidence through one of the store owners. The witness refused to answer four questions on the grounds that they were self-incriminatory. The trial court instructed the jury:

> Nor should any inference be drawn against him because the witness refused to testify, unless it would be a logical inference that would appeal to you as having a direct bearing on the defendant's guilt.

Id., 373 U.S. at 189, 83 S.Ct. at 1154.

This Court held that it could not find that "the few invocations of privilege . . . were of such significance in the trial that they constituted reversible error. . . ." *Id.*, 373 U.S. at 189, 83 S.Ct. at 1156. The Court distinguished those cases where the witness' refusal to testify was a chief source of the inference that the witness engaged in criminal activity with a party. The question of curative devices was not addressed since they had not been properly preserved at trial. Because *Namet, supra*, considered an evidentiary rule, it has equal force in both criminal and civil cases. F.R. Evid. 1101(b), (c).

The balance of legal authority is to the effect that a *witness'* claim of privilege does not create an inference of wrongdoing by a *party*. The Fifth Circuit Court of Appeals has based this rule upon substantial grounds of fairness.

> One basic reason supporting this rule—that reliable inferences from such conduct by a witness do not ordinarily follow—is exemplified by our case. The two most likely inferences to be drawn from [the witness'] claim of privilege are that she was involved in the importation scheme along with defendant LaCouture, or that she alone was guilty and LaCourture was an innocent dupe. One favors the defense, the other the prosecution; and one is as likely as the other. Others are conceivable but unlikely and irrelevant, such as that the witness was engaged in some unrelated criminal activity at the time which she wished to conceal. And as the *Bowles* court noted, a claim of fifth amendment protection is likely to be regarded by the jury as high courtroom drama and a focus of ineradicable interest, when in fact its probative force is weak and it cannot be tested by cross-examination.

United States v. *LaCouture*, 495 F.2d at 1240.

In *LaCouture*, *Id.*, the appellate court went so far as to prohibit calling a witness to the stand in front of the jury when it is known that the witness will claim the protection of the Fifth Amendment. *Id.*, at 1240. Most courts agree. *See*, *United States* v. *Johnson*, 488 F.2d at 1206, (prosecution attempted to call witnesses); *United States* v. *Harris*, 542 F.2d at 1283 (defense attempted to call witnesses); *Bowles* v. *United States*, 439 F.2d at 536 (defense attempted to call witnesses). Other Courts, provide that the witness who intends to assert their Fifth Amendment privilege may be called to the stand where a party's case would be seriously prejudiced by a failure to offer him as a witness. *United States* v. *Vandetti*, 623 F.2d at 1147.

Common law rules of evidence also oppose the rule adopted by the circuit court in the instant case. In *Hinds* v. *John Hancock Mutual Life Insurance Co.*, 155 A.2d

721 (Me. 1959), a witness refused to testify based upon her state and federal constitutional right against self-incrimination. She was the only eyewitness and the widow of decedent. The Court noted:

> It is not unreasonable to suppose that the jury may have mistaken these developments for evidence and may have somehow drawn on the erroneous inference that Mrs. Hinds had shot her husband. Although no such inference could properly be drawn from her refusal to answer, the impression that such an inference might be raised could easily have been created in the minds of the jury . . . * * * Obviously it would not have been proper for the jury to have speculated or conjectured that the witness had committed any particular crime, or especially that the witness had shot her husband.

Id., at 735.

Similarly, *Waer* v. *Waer*, 90 Atl. 1039 (N.J. 1914) held that:

> An inference that the criminating fact embodied in the question exists is not to be drawn because of this claim of privilege.

Id., at 1040, citing Wigmore on Evidence at 3147. There, the witness was asked wether he had ever committed adultery with the defendant. He refused to answer on the grounds that to do so would incriminate him.

In the instant case, both counsel for the plaintiff and defendant knew, before his testimony, that Lone Dog intended to rely upon his Fifth Amendment privilege. The court held an in-chambers' hearing on the matter at A & P's request. (TR. 2926-2940). The district court would not permit either party to call Lone Dog to the stand and ruled that Lone Dog was unavailable. The court of appeals held that the district court had erred and that on re-trial Lone Dog should be called to the stand, forced to

invoke his Fifth Amendment privilege in front of the jury and an inference could be drawn from his refusal to testify. In the interest of fairness, the court of appeals opined that plaintiffs were denied cross-examination. Yet, plaintiffs' counsel participated in the taking of Lone Dog's deposition, which was read into evidence.

The district court acted in accordance with settled authority from this Court and federal circuit courts. The Eighth Circuit Court of Appeals charted a new course relying entirely upon *Baxter* v. *Palmigiano, supra,* which concerned a *party* invoking the privilege against self-incrimination not a *witness'* assertion of that privilege. By so doing, the court of appeals has extended *Baxter* beyond its holding, and created a conflict with *Namet* v. *United States, supra,* other decisions of federal courts of appeal and common law. This is a question of federal law which congress left to this Court's final judgment.

CONCLUSION

The Eighth Circuit Court of Appeals failed to recognize that South Dakota law upheld the district court's instruction that an agent's knowledge is not imputed to a corporation when that agent acts adversely to the interests of the corporation. Additionally, the Eighth Circuit Court of Appeals failed to recognize that this Court's holding in *Baxter* v. *Palmigiano, supra.*, is limited to its facts. By extending *Baxter* v. *Palmigiano, supra.*, beyond its facts, the Eighth Circuit Court of Appeals has created a conflict in authorities which is contrary to this Court's holdings, the holdings of other courts of appeal and the black letter of the common law on a significant federal question. Federal Rule of Evidence Section 501 makes this Court the final arbiter of the question-what, if

any, effect should be given to a non-party witness' assertion of the Fifth Amendment privilege. For all the reasons set forth herein, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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WALLAHAN LAW OFFICES
532 Quincy Street
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(605) 348-0456
Attorneys for A & P Steel, Inc., Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served three true and correct copies of the foregoing Petition for Writ of Certiorari in the above-entitled action, upon the person herein next designated, all on the date below shown, by depositing a copy thereof in the United States mail, postage prepaid, in an envelope addressed to said addressee, to-wit:

Mr. Charles Rick Johnson
Johnson, Eklund & Davis
P.O. Box 149
Gregory, SD 57753-0149

which address is the last known address of the addressee known to the subscriber.

Dated this ____ day of August, 1984.

FRANKLIN J. WALLAHAN

which address is the last known address of the addressee known to the subscriber.

Dated this ____ day of August, 1984.

Franklin J. Wallahan
FRANKLIN J. WALLAHAN

APPENDIX

APPENDIX 1

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA CENTRAL DIVISION

CIV79-3060

ROSEBUD SIOUX TRIBE,

Plaintiff,

v.

A & P STEEL, INC.,

Defendant.

FILED
August 27, 1982
William F. Clayton
CLERK

JUDGMENT

This action came before this Court and a jury in a bifurcated trial. On October 9, 1981, the jury entered its verdicts and answered interrogatories concerning the liability issues in this case. On August 10, 1982, the jury rendered its verdict on the damage issue in favor of the Defendant and against the Plaintiff on the Defendant's counterclaim in the amount of $55,238.93. This Court thereafter concluded, as a matter of law, that one item of damages sustained by the Defendant in the amount of $3,654.43 was not supported by sufficient evidence and, therefore, the Judgment in favor of the Defendant and against the Plaintiff on the counterclaim should be reduced to that extent. Good cause now appearing, it is hereby

ORDERED:

(1) That the Plaintiff, Rosebud Sioux Tribe, take nothing by its Complaint against the Defendant, A & P Steel, Inc., and that the Complaint be dismissed with prejudice and on the merits; and

(2) That the Defendant, A & P Steel, Inc., have and recover from the Plaintiff, Rosebud Sioux Tribe, on the Defendant's amended counterclaim, the sum of $51,584.50, together with the additional sum of $22,818.72 as prejudgment interest thereupon, for a total of $74,403.22; and

(3) That the parties to this case shall bear their own costs and that costs shall not be allowed the prevailing party; and

(4) That the Defendant, A & P Steel, Inc., shall recover interest upon the amount set forth above at the rate provided by law upon judgments, from the date of this judgment, until payment thereof has been made. *See*, SDCL 54-3-5.1.

IT IS FURTHER ORDERED that the Plaintiffs Charles Colombe, Alvin Blacksmith, Lois Long and Jake Antoine shall be dismissed as parties plaintiff and that the Defendant Reizenstein Drilling Company shall be dismissed as a party defendant, with prejudice and on the merits. This Court's prior Order dismissing the individually named plaintiffs was without prejudice solely during the pendency of this action, in order to protect their interests in this case in the event that the Tribe decided not to prosecute the matter on behalf of the members of the Rosebud Sioux Tribe.

Dated this 27th day of August, 1982.

BY THE COURT:

ANDREW W. BOGUE
CHIEF JUDGE

ATTEST:

WILLIAM F. CLAYTON, Clerk

By JEANA L. HAAG Deputy

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 27 day of August, 1982.

William F. Clayton
Clerk

APPENDIX 2

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA CENTRAL DIVISION

CIV79-3060

ROSEBUD SIOUX TRIBE,

Plaintiff,

v.

A & P STEEL, INC.,

Defendant.

FILED
September 10, 1982
William F. Clayton
CLERK

ORDER

The Plaintiff, Rosebud Sioux Tribe, has moved this Court for its order granting the Plaintiff a new trial on the issues raised in the Defendant's counterclaim. The Plaintiff previously moved this Court for its order granting a new trial on the liability issues which were presented to the jury and determined against the Plaintiff. This Court must note initially that the Plaintiffs have supplied the Court with no legal authority supporting their position that the grounds stated in their motion form sufficient legal basis for a new trial. Nonetheless, this Court has considered the grounds stated in its most recent motion for a new trial, together with those stated in its motion for a new trial on the liability issues filed previously with this Court. No good cause appearing, it is hereby

ORDERED that the Plaintiff's motion for a new trial, both on the counterclaim issues and on the liability issues is denied.

Dated this 10th day of September, 1982.

ATTEST:

WILLIAM F. CLAYTON, Clerk

By JEANA L. HAAG Deputy

NOTICE OF ENTRY

Take notice that the original of this copy was filed and entered in the office of the Clerk of the United States District Court for the District of South Dakota on the 10 day of Sept, 1982.

William J. Clayton
Clerk

APPENDIX 3

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CIV 79-3060

ROSEBUD SIOUX TRIBE,

Plaintiff,

v.

A & P STEEL, INC.,

Defendant.

FILED
May 16, 1982
William F. Clayton
CLERK

ORDER

Following a bifurcated trial of the issues of liability and damages, this Court entered its Judgment on August 27, 1982. That Judgment reflected the jury verdicts in favor of Defendant on its counterclaim, and against Plaintiff on all claims made in its Complaint. Plaintiff's motion for a new trial was denied on September 10, 1982. Both Plaintiff and Defendant filed notices of appeal. Plaintiff then filed a motion to vacate the Judgment on December 29, 1982, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. After briefs were filed in connection with the Rule 60 motion, this Court reserved its ruling during the pendency of an automatic stay in force in proceedings in bankruptcy for the Defendant A & P Steel, Inc., in the United States Bankruptcy Court for the District of Col-

orado. Having received notice and a copy of a stipulation and Order for relief from the automatic stay, the Court may now address the Plaintiff's motion under Rule 60(b).

The Plaintiff alleges that Richard Lone Dog gave testimony in grand jury proceedings which culminated in an Indictment and trial in the case of *United States* v. *Michael Strain*, CR82-30055-01 (D.C. S.D., Central Division). That trial commenced on November 1, 1982, after the Judgment was filed in this case. Plaintiff contends that the testimony of Lone Dog in the grand jury proceedings establishes that both he and Michael Strain gave perjured testimony on certain matters in the trial of this civil case. As a result of the alleged perjury, Plaintiff contends that it is entitled to relief from the Judgment on the grounds of newly discovered evidence, Rule 60(b)(2); fraud of an adverse party, Rule 60(b)(3); and fraud upon the court.

The facts at issue concern allegations that Lone Dog and Ed Driving Hawk, in a conspiracy with Defendant A & P Steel, received kickbacks through Michael Strain in return for their assistance in modifying a general guarantee on the irrigation project; in obtaining unauthorized sign-offs of the irrigation systems for Defendant; in obtaining the release of Defendant and its bonding company; and in allowing Defendant to be paid a retainage fee before it was due. At trial and in this motion Plaintiff alleges that Strain was acting as the agent and attorney for Defendant when he wrote a series of checks to Lone Dog and to Driving Hawk, which constituted the kickbacks. It is well settled that the burden is upon the Plaintiff to prove its allegations of fraud and perjury by clear and convincing evidence in order to obtain relief from the Judgment. *Assman* v. *Fleming*, 159 F.2d 332 (8th Cir. 1947).

The testimony of Lone Dog, in both the grand jury and criminal proceedings, does not constitute clear and convincing evidence that he gave perjured testimony in his civil deposition concerning his receipt of kickbacks from Defendant, or that he took money from Defendant in return for any of the above listed "favors." In his subsequent testimony, Lone Dog consistently denied that the checks he received from Strain constituted payments for his activities in connection with the irrigation project. At the criminal trial of Michael Strain, Lone Dog just as consistently testified that the checks from Strain were payments for hay and a truck which Lone Dog sold to Strain. Plaintiff failed to cite any evidence that Strain perjured himself in this case and contends only that Lone Dog did so at Strain's request.

The only clear evidence of perjury in Lone Dog's civil deposition arises in connection with his testimony about the actual delivery of hay to Strain, pursuant to the sale agreement allegedly reflected in the series of checks Lone Dog received from Strain. At page 43 of his deposition testimony, which was read into evidence in this case, Lone Dog stated he once delivered hay to Strain at White River, South Dakota, using a flatbed trailer and a pickup truck. During the subsequent criminal proceedings involving Lone Dog and Strain, Lone Dog recanted this testimony about the delivery of hay.

At page 51 of the transcript of the federal grand jury proceedings involving the investigation of Strain, Driving Hawk, and Lone Dog, Richard Lone Dog testified as follows: Question: Did Mr. Strain ask you to alter or to give false testimony in that civil suit? Answer: Yes." The grand jury transcript filed by Plaintiff does not disclose whether Lone Dog did give false testimony, but only that he was asked to do so. Nonetheless, in response to Plain-

tiff's motion, Defendant attached as Exhibit A the transcript of Lone Dog's testimony at the trial of *United States* v. *Michael Strain*. At page 36 of that transcript, Lone Dog testified as follows: Question: "Were you asked questions about your delivering some of the hay?" Answer. "Yes." Question: "What did you say during the course of that deposition?" Answer: "I told them that I delivered some of the hay." Question: "Were you telling the truth?" Answer: "No." At page 39 of that same transcript, Lone Dog denied that everything he stated in his deposition was true. Finally, in the criminal trial, Lone Dog was directed to the specific statement he made at page 43 of his civil deposition concerning the instance of the delivery of hay to White River, South Dakota. At page 64 of the criminal trial transcript, Lone Dog indicated that his testimony was false; he never delivered any hay to White River, or to Strain, and he lied under oath at Strain's request.

Initially, the Court must observe that the sections of Rule 60(b) relied upon by Plaintiff are inapplicable to the claims made. First, to constitute newly-discovered evidence under Rule 60(b)(2) the evidence must have been in existence at the time of the trial. Clearly, an admission by Lone Dog that no hay was delivered was not evidence which existed at the time of the trial of this case. Furthermore, a Rule 60(b) motion cannot be granted on the basis of newly-discovered evidence when the evidence is merely cumulative or impeaching, and is not such as would probably have affected the outcome of the trial. *See, Wilson* v. *Thompson*, 638 F.2d 801 (5th Cir. 1981); *Trans Mississippi Corp.* v. *United States*, 494 F.2d 770 (5th Cir. 1974). The testimony of Lone Dog in the criminal proceedings is cumulative of other evidence adduced at trial that deliveries of hay were not made to correspond to every check Lone Dog received from Strain. The criminal

testimony of Lone Dog constitutes impeachment of his prior testimony that some hay had been delivered. Plaintiff also failed to show how Lone Dog's subsequent testimony, indicating as it does his adherence to the position that no kickbacks were taken, would have changed the result at trial, as the Court will discuss further.

The Court further concludes that the Plaintiff has failed to establish a claim under Rule 60(b)(3) for alleged fraud of an adverse party. The Court does not accept Plaintiff's argument that Strain at all times pertinent to the events in this case was the attorney and agent for A & P Steel, and therefor, constituted a party adverse to the Plaintiff. The fact of the matter is that both Strain and Lone Dog were employees of or were acting on behalf of Tribal Land Enterprises, a subsidiary corporation formed by the Plaintiff. The Court instructed the jury to determine whether Lone Dog and Strain and other alleged participants in a fraudulent scheme were acting as agents of the Defendants; that issue apparently was resolved by the jury against the Plaintiff. Thus, assuming that Lone Dog and Strain were guilty of perjury at the trial of this action, they were not adverse parties within the meaning of the rule. There is no claim that the Defendant A & P Steel knew of or participated in the alleged perjury of Strain and Lone Dog. *See, Crateo, Inc.* v. *Intermark, Inc.*, 536 F.2d 862 (9th Cir. 1976). Additionally, the allegations of the Plaintiff on this motion do not fall within the definition of the fraud upon the Court, which may permit the Court to grant relief from a judgment. *See, Pfizer, Inc.* v. *International Rectifier Corp.*, 538 F.2d 180 (8th Cir. 1976); *Porcelli* v. *Joseph Schlitz Brewing Company*, 78 F.R.D. 499 (E.D. Wis. 1978); *Great Coastal Express, Inc.* v. *International Brotherhood of Teamsters, etc.*, 86 F.R.D. 131 (E.D. Va. 1980), *aff'd* 675 F.2d 1349 (4th Cir. 1982).

The authorities indicate, however that allegations of perjury on the part of a third-party witness may be raised under Rule 60(b)(6), which provides for relief from a Judgment for any other reason not stated in the prior sections of Rule 60(b). *Armour & Company* v. *Nard*, 56 F.R.D. 610 (N.D. Ia. 1972); *Lester* v. *Empire Fire & Marine Insurance Co.*, 87 F.R.D. 466 (E.D. Mo. 1980), *aff'd* 653 F.2d 353 (8th Cir. 1981). Under this section, as in the case of perjury by a party,

> "[p]erjured testimony that warrants disburbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been not false merely, but to have been willfully and purposefully falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result. Further, a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial. . . ." *Shammas* v. *Shammas*, 9 N.J. 321, 88 At.2d 204 (1952), per Judge (now Justice) Brennan, quoted in 11 Wright & Miller, *Federal Practice & Procedure, Civil*, § 2861, P. 195.[1]

As always, a motion under Rule 60(b) is addressed to the sound discretion of the District Court. When a final judgment is attacked on the grounds that it was procured by

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[1] This Court found no authority supporting the rule that *any* evidence of perjury, regardless of its materiality to the issues, constitutes grounds for vacating a judgment. There is persuasive authority which directs the court to consider whether the perjured testimony was material in producing the judgment, or otherwise concerned an issue which was central to the litigation as a whole. *See, Alberta Gas Chemicals, Lts.* v. *Celanese Corp.*, 650 F.2d 9 (2nd Cir, 1981); *Good Luck Nursing Home, Inc.* v. *Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980); *Great Coastal Express, Inc.* v. *Intern. Broth. of Teamsters*, 675 F.2d at 1354; *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 (10th Cir. 1972); 7 Moore's *Federal Practice*, section 60.24[5], p. 291.

false testimony, the Court must also balance competing concerns for the fairness and integrity of the judicial determinations, on the one hand, and of a policy favoring finality in litigation on the other. *See, TAS International Travel* v. *Pan American World Airways*, 96 F.R.D. 205, 208 (S.D. N.Y. 1982).

This Court finds and concludes that Plaintiff failed to establish clear and convincing evidence of perjury on the part of Strain and Lone Dog as their testimony relates to the payment of bribes or kickbacks for services rendered in connection with the irrigation project. Lone Dog admitted giving false testimony on a single subject—the delivery of hay on one instance to White River. Lone Dog apparently also admits that this testimony was willfully and purposefully falsely given. This admission alone provides evidence of perjury on the part of Lone Dog, and as such, constitutes a direct assault upon the integrity of the Court and of the judicial process. Although the Court has grave concern that no perjury should be tolerated in this context, the Court must consider other factors in ruling upon the Plaintiff's motion.

The Court must determine whether the Judgment was in part obtained by the use of perjured testimony. In this connection, the Court must now conclude that the testimony concerning the delivery of hay on one occasion to White River, South Dakota, could not have controlled the result of this long and complicated trial. Ample evidence was submitted to the jury on which it could have found the checks made to Lone Dog and Ed Driving Hawk were not payments for hay, for a pickup truck, or other purposes alleged. There was evidence that these checks had been altered to reflect payment for these purposes *after* the checks had been processed by the bank. Additionally, the jury was instructed to determine, if bribery and fraud

occurred, whether Strain, Lone Dog, Driving Hawk and Dan McPhearson were acting for their own independent purposes, and not as agents of A & P Steel in the commission of a fraud. There was sufficient evidence on which the jury could have determined that these persons were not acting as agents of A & P Steel. Therefore, even if the jury had heard the testimony of Lone Dog that no delivery of hay was made on that one occasion to White River, the verdict against the Plaintiff on its claim of fraud is supportable on independent grounds and by substantial evidence. Thus, the Court must conclude that the Judgment was not procured by the use of vital, perjured testimony.

The Court also finds and concludes that Plaintiff has failed to show that the fact of the falsity of Lone Dog's testimony could not have been discovered by reasonable diligence in time to offset it at the trial of this case. This Court is not persuaded that the grand jury testimony of Lone Dog was the only means by which the truthfulness of his deposition testimony could have been tested.

The evidence of perjury on the part of Lone Dog as to a single delivery of hay did not preclude the Plaintiffs from fully and fairly presenting their claim of fraud. This case was competently and thoroughly presented to the jury in a trial which lasted approximately six weeks. The liability and damages issues were bifurcated, and after a period of delay during which settlement was apparently discussed, the damages issues were tried for another week. The jury verdict on all issues was consistently and completely in favor of the Defendant. Although the Court is shocked and outraged at the admission of perjury in any proceeding in this Court, it must also consider the important policy favoring finality in litigation. This is not an instance when the fraud or perjury was committed by a party who

would be rewarded by his own misconduct if the Court denied a motion to vacate the Judgment. Furthermore, in balancing the equities, the Court must note that the case was submitted to the jury on three issues—negligence, breach of contract, and fraud. The jury found for Defendant on all three. But Plaintiff's claims on its present motion appear directed only to the integrity of the verdict on the fraud theory. It would be manifestly unjust to Defendant to require a retrial of all issues because of perjured testimony in connection with but one of the theories of recovery. There is simply no proof that the Defendant knew of or participated in the perjury committed by Lone Dog.

Although the question is very close, the Court must exercise its discretion to conclude that substantial justice between these litigants will not be secured if the jury verdict entered after such a long and difficult trial is overturned. The Judgment under attack stands, aside from the perjury of Lone Dog concerning a single instance of the delivery of hay, upon sufficient and adequate evidence from which the jury could determine either that no fraud or kickbacks occurred, or if they did, that the parties involved were acting for their own independent purposes and not as agents of the Defendant A & P Steel. The Court, therefore, is reluctant to overturn the jury's findings of fact, and is compelled to conclude, in the exercise of its discretion, that the evidence of perjury on the part of Richard Lone Dog, and by inference on the part of Michael Strain, is insufficient to affect the verdict.

Accordingly, for the reasons stated above, it is hereby

ORDERED that Plaintiff's motion for relief from the verdict and judgment is denied.

Dated this 16th day of May, 1983.

BY THE COURT:

ANDREW W. BOGUE
CHIEF JUDGE

ATTEST:
WILLIAM F. CLAYTON, Clerk
By JEANA L. HAAG Deputy

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1748
No. 82-2187
No. 82-2217

ROSEBUD SIOUX TRIBE,

Appellant,

v.

A & P STEEL, INC.,

Appellee.

Appeal from the United States District Court for the District of South Dakota.

Submitted: January 9, 1984

Filed: April 25, 1984

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BRIGHT, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

The plaintiff,[1] the Rosebud Sioux Tribe (Tribe), sued the defendant, A & P Steel, Inc. (A & P), in United States

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[1] Initially, the plaintiffs were enrolled members of the Tribe, suing on behalf of the Tribe, alleging a conspiracy and collusion between Tribal officials and the defendant to defraud the Tribe and its members of grant monies assigned to the Tribe for the purpose of installing a large scale irrigation project on Tribal lands. Later the Rosebud Sioux Tribe, after a Tribal election, sought to intervene. This motion was granted by the trial court, and the individual parties were later dismissed as unnecessary parties.

District Court for the District of South Dakota.[2] The suit sought damages for fraud, conspiracy, breach of contract and breach of warranties arising out of a contract for the development of an irrigation system on land owned by the Tribe.[3] The jury returned a verdict for A & P. A judgment dismissing the Tribe's complaint, and awarding over seventy-four thousand dollars to A & P on its counterclaim, was entered on August 27, 1982. The Tribe filed a timely notice of appeal with this court, and A & P cross-appealed.

On December 29, 1982, the Tribe filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b). The trial court denied the motion on May 16, 1983, and the Tribe appealed this denial. The Tribe's appeal from the underlying action, A & P's cross-appeal, and the Tribe's appeal from denial of the 60(b) motion were consolidated. This court heard oral argument on January 9, 1984. We reverse the denial of the 60(b) motion, and we remand for a new trial consistent with this opinion.

I. FACTS

a. The Parties

In 1977, the chairperson of the Tribe, Edward Driving Hawk, contacted the attorney for Tribal Land Enterprises (TLE), Michael Strain. Richard Lone Dog was the chairperson of TLE. TLE is a subsidiary of the Tribe, but it is a separate corporation with different stockholders, and it is responsible for the administration of all land owned by the Tribe. Driving Hawk sought Strain's assistance in obtaining funds for irrigation development under

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[2] The Honorable Andrew W. Bogue, United States District Court for the District of South Dakota.

[3] The funds made available by a grant for the project amounted to $2,063,380.00.

the Emergency Drought Assistance Act of 1977, Pub. L. No. 95-18, 91 Stat. 36 (1977). Attorney Strain was, in fact, instrumental in securing a grant which ultimately exceeded two million dollars.

After preliminary negotiations with various companies, the Tribe, through Driving Hawk, and A & P, through its vice-president, Dan McPherson, began contract negotiations. On June 21, 1977, Charles Colombe, a member of the Tribal Council, drafted and presented a resolution which authorized Driving Hawk to negotiate and enter into a contract for the construction of an irrigation system. The Tribal Council unanimously adopted the resolution. Attorney Strain drew up the contract which was signed by both parties on June 21, 1977. Driving Hawk issued a "notice to proceed" on the same day, and A & P began construction on the project.

Attorney Strain formed a dummy corporation, Frontrunner Associates, Inc., on July 13, 1977. This corporation received payments from A & P, and made payments to Driving Hawk and Lone Dog as set out in the following chart.

Payments to Frontrunner from A & P

Date	Amount
July 19, 1977	$13,000.00
Aug. 8, 1977	16,673.47
Aug. 22, 1977	14,723.47
Oct. 3, 1977	37,562.19
Oct. 24, 1977	25,526.19
Nov. 4, 1977	22,276.19
Feb. 6, 1978	44,159.92

Payments from Frontrunner to
Driving Hawk and Lone Dog

Driving Hawk		Lone Dog	
Date	**Amount**	**Date**	**Amount**
Aug. 8, 1977	$2,500.00	July 19, 1977	$2,000.00
Aug. 23, 1977	1,500.00	Aug. 8, 1977	2,500.00
Oct. 3, 1977	2,000.00	Aug. 23, 1977	900.00
Oct. 3, 1977	2,217.00	Oct. 3, 1977	2,000.00
Oct. 25, 1977	2,000.00	Oct. 3, 1977	1,717.00
Nov. 14, 1977	2,000.00	Oct. 12, 1977	2,150.00
		Nov. 15, 1977	1,764.00
Total	$12,217.00	Total	$14,031.00

After these checks were returned by the bank to Attorney Strain, he entered the subject of each "purchase" on the memo portion of each check. Strain claimed that the payments to Driving Hawk and Lone Dog were for legitimate purchases.

The payments from A & P to Attorney Strain reflect the fact that he had been hired by A & P, shortly after the Tribe and A & P had made their agreement, as a "consultant" on the irrigation project. Thus, Strain was working for the Tribe and A & P simultaneously. Initially, A & P was to pay Attorney Strain $2,000 per month plus 4.5% of the contract amount. When the contract was expanded, Strain was to be paid $2,000 per month plus 6% of the contract amount. The president of A & P, Thomas Pearce, admitted at trial that, in an earlier and unrelated legal proceeding, he had testified that he was aware Strain was the attorney for TLE at the time A & P put Strain on retainer.

On June 29, 1978, Colombe appeared before the Tribal Council and made allegations to the effect that fraud, corruption and nepotism surrounded the irrigation project. As a result, the Council passed resolutions that pro-

vided for the formation of an investigatory committee, and also provided that "sign-offs" on the irrigation systems and finalization of the contract would be suspended until the committee completed its investigation. Driving Hawk presided at this meeting. The Tribe alleges that Strain obtained a copy of the minutes from the meeting and sent a copy to A & P.

Before the June 29 Council meeting, Driving Hawk had delegated to Eddie Farmer the task of checking and "signing off" each of the irrigation systems. Farmer began the sign-offs on June 6 and, despite the resolutions adopted by the Council, continued to make sign-offs until July 5, 1978. A separate sign-off for each system was signed by Farmer. After all the sign-offs were complete, Driving Hawk tried to pay A & P the balance of the contract price, but the check bounced because of insufficient funds.

b. The Contract.

The parties had entered into a "turn-key" contract. That is, while the Tribe retained the right to determine the location of each irrigation system, A & P was responsible for the design, engineering, surveying, labor, supervision, equipment, tools, and materials incidental to the construction of each system. The contract document incorporated, by reference, a statement of contract conditions, a schedule for payments, and a "proposal".

There were several conditions to the contract, a few of which are relevant here. A & P was to guard the Tribe's property from injury or loss. Pursuant to this provision, A & P agreed to acquire insurance for this purpose and explicitly assumed responsibility for security. All work, material and records related to the project were to be subject to inspection by authorized Tribal representatives.

Further, the Tribe was to be the final judge of the quality and suitability of each phase of the project. Anything which did not meet the Tribe's approval was to be rebuilt, replaced, or fixed by A & P at A & P's expense. If this option was undesirable, the Tribe retained the right to reduce A & P's compensation in an amount the Tribe felt was equitable.

As each irrigation system was finished, it was to be inspected by the Tribe. If the work was acceptable, the Tribe was to pay A & P for the system less 10% as retainage. Upon this payment, a system became the Tribe's property, but payment was not to relieve A & P from responsibility for the obligations it had assumed under the contract. Nor was payment to be construed as a waiver of the Tribe's right to require fulfillment of the contract terms. If, after half of the work was done, the Tribe determined that A & P's performance was satisfactory, the Tribe was to pay in full for the work subsequently completed. However, the Tribe would continue to hold onto the fees retained during the first half of the project until thirty days after a certificate of completion had been issued.

Finally, the statement of conditions included a general guarantee.

> Neither the final certificate of payment nor any provision in the contract documents nor partial or entire occupancy of the premises by [the Tribe] shall constitute an acceptance of work not done in accordance with the contract documents or relieve [A & P] of liability in respect to any express warranties for faulty materials or [work]. [A & P] shall remedy any defects in the work and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of final acceptance of work unless a longer period is specified. [The Tribe] will give notice of observed defects with reasonable promptness.

The "proposal" contained a list of parts and their cost. It also contained a limited, one year warranty which included a general disclaimer of all other warranties.[4] The contract was signed on June 21, 1977. The proposal was mailed to the Tribe on June 30, 1977.

c. Lone Dog's Deposition And Grand Jury Testimony.

Before trial, the Tribe took the deposition of Richard Lone Dog who held the chair of TLE. At the time the deposition was taken, Lone Dog was represented by Attorney Strain. Lone Dog's deposition testimony flatly contradicted the allegations contained in the Tribe's complaint.

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[4]

Warranty

Limited One Year Warranty

A & P Steel, Inc., and Seller warrant each of its irrigation systems and parts and accessories thereof to be free from defects in materials and workmanship under normal use and service for a period of one year from date of delivery of any such system, part or accessory to the purchaser thereof. A & P Steel, Inc. and Seller will replace or repair, at their option, F.O.B. Colorado Springs, Colorado, any part or accessory which is discovered to be defective within the one year period. Notice of any claim hereunder must be delivered in writing to A & P Steel, Inc., at its offices in Colorado Springs and to Seller at its offices within 30 days of the discovery of the defect giving rise to such claim.

This Warranty shall NOT apply:

(a) To any part or system which has been repaired or altered in any manner not authorized by A & P Steel, Inc.; to any system or part which has been subject to misuse, accident, vandalism, or act of God; or to any system or part which has not been installed according to manufacturer's specifications;

(b) If the water used in the system contains materials or chemicals which adversely affect the operation of the system or any of its parts;

The Tribe subpoenaed Lone Dog as a witness for trial. Lone Dog had been advised by his attorney to invoke the Fifth Amendment's protection against self-incrimination and refuse to testify. A & P objected to the Tribe calling Lone Dog to the stand solely for the purpoe of having the jury hear him claim the Fifth Amendment. Following an *in camera* hearing, the trial court sustained A & P's objection. The trial court offered to let the Tribe read Lone Dog's deposition into evidence, but the Tribe declined.

During the presentation of its case, A & P tried to read into evidence Lone Dog's deposition. The Tribe objected. Following another *in camera* hearing, the trial court

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(c) If the system is operated on grades in excessof 15 percent;

(d) If the system or any part thereof is damaged as a result of surge pressures in excess of 150 P.S.I. or the application of insufficient, excess or improper electrical voltage and current;

(e) If the system is operated in lagoons, swamps or other water saturated soils;

(f) If the system is operated without a connected and operating shut-off system;

(g) If the system it operated in air temperatures of 38 or less;

A & P Steel, Inc. assumes no responsibility for placement of the pivot point location in fht [sic] field.

WARRANTY DISCLAIMERS: NO WARRANTIES, EXPRESS OR IMPLIED, OTHER THAN THE EXPRESS WARRANTY SET FORTH ABOVE, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE MADE BY MANUFACTURER OR SELLER. NEITHER MANUFACTURER NOR SELLER ASSUMES ANY RESPONSIBLITY FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF A BREACH OF THIS CONTRACT OR OF THE TERMS OF THE EXPRESS WARRANTY OR OUT OF THE OPERATION OR INABILITY TO OPERATE THE EQUIPMENT COVERED HEREUNDER.

overruled the Tribe's objection because Lone Dog still claimed the Fifth Amendment and thus was held to be an "unavailable witness". *Fed. R. Civ. P.* 32(a)(3)[5]; *Fed. R. Evid.* 804(a)(1).[6]

On September 18, 1981, Lone Dog appeared as a witness before a federal grand jury. He testified that, prior to the time the contract between the Tribe and A & P was signed, Strain approached Lone Dog, told him he intended "to make some money off the contract", and would be inclined to give some of this money to Lone Dog.[7] Lone Dog was shown each of the checks which Strain had made out to Lone Dog, and testified as to what each *allegedly*

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[5] *Fed. R. Civ. P.* 32(a)(3) provides:

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admisible under the rules of evidence applied as though the witness wee then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions

. . . .

. . . .

. . . (3) the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

[6] *Fed. R. Evid.* 804(a)(1) provides:

"Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;

[7] Evidence adduced at trial revealed that Lone Dog did receive $14,031.00 from Strain over a period of six months.

had bought. Long Dog then testified that the six checks which reflected purchases of hay actually were "payoffs". He also testified that a seventh check which reflected a purchase of a pick-up truck was partially a payoff.

Lone Dog testified that he had neither sold not delivered *any* hay to Strain. Finally, he testified that Attorney Strain had advised him to give false testimony during the deposition.

II. DISCUSSION.

a. The Rule 60(b) Motion.

After the Tribe became aware of Lone Dog's grand jury testimony, it moved for relief from judgment on the grounds of newly discovered evidence under *Fed. R. Civ. P.* 60(b) (2), fraud of an adverse party under *Fed. R. Civ. P.* 60(b) (3), and fraud upon the court under *Fed. R. Civ. P.* 60(b) (6). The trial court held that Rule 60(b) (2) was inapplicable to the facts of this case because: (1) Lone Dog's inconsistent stories were not evidence which existed at the time of the trial; (2) the evidence was merely cumulative or impeaching; and (3) the evidence was not such as probably would have affected the outcome of trial. We disagree. We also think a fraud has been practiced on the Tribe and on the court, which impinged the integrity of the trial process, and that the Tribe should have been granted a new trial under Rule 60(b) (2) and (3).

We recognize that a Rule 60(b) motion is viewed with disfavor and is addressed to a district court's discretion which an appellate court will not disturb in the absence of abuse. *Dabney* v. *Montgomery Ward & Co., Inc.*, 692 F.2d 49, 52 (8th Cir. 1982), *cert. denied*, 77 L.Ed.2d 1316 (1983); *Edgar* v. *Finley*, 312 F.2d 533, 536-37 (8th Cir. 1963). Nevertheless, Rule 60(b) motions serve a useful, proper and necessary purpose in maintaining the in-

tegrity of the trial process, and a trial court will be reversed where an abuse of discretion occurs. The Rule "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances," *Clarke* v. *Burkle*, 570 F.2d 824, 830-31 (8th Cir. 1978), *quoting*, *Hoffman* v. *Celebreeze*, 405 F.2d 833, 835 (8th Cir. 1969); *Consolidated Gas & Equip. Co.* v. *Carver*, 257 F.2d 111, 114 (10th Cir. 1958); *see Assman* v. *Fleming*, 159 F.2d 332, 336 (8th Cir. 1947).

Rule 60(b) was intended to preserve "the delicate balance between the sanctity of final judgments . . . and the incessant command of a court's conscience that justice be done in light of all the facts." *Good Luck Nursing Home, Inc.* v. *Harris*, 636 F.2d 572, 577 (D.C. Circ. 1980), *quoting*, *Bankers Mortgage Co.* v. *United States*, 423 F.2d 73, 77 (5th Cir.), *cert. denied*, 399 U.S. 927 (1970); *see United States* v. *Walus*, 616 F.2d at 288. According to *Johnson Waste Materials* v. *Marshall*, 611 F.2d 593, 600 (5th Cir. 1980), *quoting*, *Laguna Royalty Co.* v. *Marsh*, 320 F.2d 817, 823 (5th Cir. 1965), the Rule is to be given a liberal construction" and "is to be construed liberally to do substantial justice." *See Edgar*, 312 F.2d at 538.

In order to obtain relief under Fule 60(b) (2), on grounds of newly discovered evidence, the moving party must establish that: (1) the evidence was discovered after trial; (2) it exercised due diligence to obtain the evidence for trial; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that a new trial probably would produce a new verdict. *United States* v. *Gustafson*, No. 83-1631, slip op. at 9 (8th Cir. Feb. 29, 1984); *Walus*, 616 F.2d at 287-88; *Johnson Waste*, 611 F.2d at 597; *Edgar*, 312 F.2d at 537. We consider these requirements seriatim.

Judgment in this case was entered on August 27, 1982. The Tribe first became aware of Lone Dog's grand jury

testimony during the criminal trial the government brought against Strain, which began on November 1, 1982. It is clear that the evidence was discovered after trial.

In denying the motion for a new trial, the trial court found that the Tribe had failed to prove that it had exercised due diligence to produce evidence of Lone Dog's inconsistent stories in time for trial. We disagree.

At the time of trail the Tribe had done everything it could have done to discredit Lone Dog's deposition testimony and to establish that A & P and Lone Dog were involved in a conspiracy. The Tribe took Lone Dog's deposition; the Tribe proved that Lone Dog had received a series of payments from Strain and that these payments coincided with payments Strain had received from A & P; the Tribe adduced evidence that the checks Strain had made out to Lone Dog had been altered to reflect the alleged subject of each purchase after the checks had been processed by the bank; and the Tribe tried to subpoena Long Dog as a witness. Further, the Tribe filed a 60(b) motion promptly after discovering that Lone Dog had told inconsistent stories. We believe that these actions reflect due diligence on the Tribe's part.

The trial court also held that the Tribe had failed to meet the standards of Rule 60(b) because the evidence of Lone Dog's inconsistent stories did not exist at the time of trial. We have been unable to locate authority for this proposition. However, it is not necessary to reach the question. If, as Lone Dog has testified, his deposition contained perjured testimony, then the perjury existed at the time of trial. In fact it was read into evidence at trial. It does not matter that an admission of perjury came to light only after trial.

The trial court also held, in essence, that the grand jury testimony merely was cumulative or impeachment evidence. We disagree.

The evidence which the Tribe adduced to show Lone Dog's involvement in the alleged conspiracy has been set forth already. All of that evidence was circumstantial. Absent concrete evidence of wrong-doing, the jury may not have had sufficient reason to doubt Lone Dog's deposition testimony. Lone Dog's grand jury testimony, however, is the only concrete evidence there is that A & P may have been making payoffs to members of the Tribe through Strain. While in a technical sense Lone Dog's grand jury testimony is cumulative, in another sense the evidence sheds an entirely different light on the circumstantial evidence and lends greater weight to the Tribe's allegations. At the same time, the admissions in the grand jury testimony discredit one of A & P's principal witnesses. The entire complexion of the case has been changed. Under these circumstances, Lone Dog's grand jury testimony cannot be construed as "merely cumulative." Nor, for the same reasons, can this evidence be catagorized solely as "impeachment" evidence.

The district court did not address directly the issue of materiality. However, the conclusion that the grand jury testimony was not material can be gleaned from the language of the opinion. The court seemed to reach this conclusion by comparing the deposition testimony with the testimony Lone Dog gave at Strain's criminal trial. This analysis misses the mark for significant reasons.

From a reading of the record and briefs, it appears that, with one exception, Lone Dog's deposition testimony regarding the money he received from Strain and the testimony he gave at Strain's trial were consistent, even though both the deposition and trial testimonies

were inconsistent with Lone Dog's grand jury testimony. However, this consistency does not detract from the materiality of the grand jury testimony.

It must be remembered that Lone Dog assumed, not only a fiduciary position in relation to the Tribe but also, a position central to facilitation of the irrigation project. The grand jury testimony flatly contradicts the testimony Lone Dog gave in two other proceedings; he testified that he had accepted payoffs from Strain and that Strain asked him to lie when the deposition was taken. If we assume that Lone Dog testified truthfully before the grand jury, then the materiality of the evidence is apparent. As the Tribe points out, the perjured deposition testimony is not "some inconsequential fact." Rather, it is a fact "which binds all of the other facts together" and tends to prove the Tribe's allegations. Conspiracy was a central issue in the case, and whether Lone Dog was receiving payoffs from A & P through Strain is material to the issue of conspiracy.

However, even if we make no assumptions about the truth of the testimony Lone Dog gave on three separate occasions, the inconsistent stories still are material evidence in this case. Lone Dog was a principal witness in A & P's case. At the very least, his inconsistent stories demonstrate that he is a liar and, as such, a witness whose testimony is significant enough to have swayed the jury to return a verdict for A & P. At a minimum, the Tribe is entitled to an opportunity to present *all* the relevant facts to a jury. For all these reasons, we conclude that the evidence of Lone Dog's grand jury testimony is such that a new trial probably would produce a new verdict.

b. The Agency Instruction

One of the bases supporting the trial court's denial of the 60(b) motion was the possibility that the jury may

have determined that, if fraud and bribery occurred, Strain, Lone Dog, Driving Hawk, and McPherson were acting for their own independent purposes and not as agents of A & P. If indeed the jury made this determination, it did so pursuant to an instruction given by the trial court. Instruction No. 10 provided:

> An act of an officer, agent or employee of a corporation done to effect some independent purpose . . . is not within the scope of . . . employment and accordingly the corporation will not be charged with notice of facts of which an officer, agent or employee acquires knowledge . . . while acting in a transaction in which he is interested, either for himself or for another, adversely to the corporation.

This instruction is erroneous, as a matter of law.

Fed. R. Civ. P. 61 provides in pertinent part, as follows:

> No error in either the admission or exclusion of evidence and no error or defect in any ruling or order in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court . . . must disregard any error or defect . . . which does not affect the substantial rights of the parties.

The rule is adhered to save in exceptional cases "where the obvious result would be a plain miscarriage of justice" . . . *United States* v. *South Dakota*, 665 F.2d 837, 842 (8th Cir. 1981), *cert. denied*, 74 L.Ed 2d 58 (1982), *quoting*, *Hormel* v. *Helvering*, 312 U.S. 552, 558 (1941) or would be "inconsistent with substantial justice." *United States* v. *South Dakota*, 665 F.2d at 842. The rule applies to jury instructions as well as other errors. *E. F. Hutton Co., Inc.* v. *Berns*, 682 F.2d 173, 177 (8th Cir. 1982). In determining whether an erroneous jury instruction

affects the substantial rights of one party, we look to the record as a whole including the allegations of the complaint, the evidence, and the remaining instructions. *Hallberg* v. *Brasher*, 679 F.2d 751, 758 (8th Cir. 1982).

A principal is liable for the deceitful or fraudulent acts of its agents, which are committed in the course of the business the agent was appointed to carry out. *United States* v. *Johnson*, 541 F.2d 710, 712 (8th Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977); *Myzel* v. *Fields*, 386 F.2d 718, 738, 749-50 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Weaver* v. *Metropolitan Life Ins. Co.*, 545 F. Supp. 74, 77 (E.D. Mo. 1982); *Southern Pac. Transp. Co.* v. *Continental Shippers Ass'n*, 485 F. Supp. 1313, 1319 (W.D. Mo. 1980), *aff'd*, 642 F.2d 236 (1981). *See Karlen* v. *Ray E. Friedman & Co. Commodities*, 688 F.2d 1193, 1198 n.5 (8th Cir. 1982). This is true even if the agent's conduct is carried on without the principal's knowledge. *Myzel*, 386 F.2d at 738; *Weaver*, 545 F. Supp. at 77; *see Karlen*, 688 F.2d at 1198 n.5. Between a principal and a third party, the principal must bear the burden of an agent who has acted improperly. *Johnson*, 541 F.2d at 713, *quoting*, *Standard Distrib.* v. *F.T.C.*, 211 F.2d 7, 15 (2d Cir. 1954).

It is undisputed that A & P, not McPherson in his personal capacity, hired Attorney Strain as a "consultant" on the irrigation project. Further, Pearce, as president of A & P, was aware that Strain had been hired. Finally, the money Strain received from his involvement with the project came from A & P out of corporate funds—not out McPherson's pocket. It is clear, as a matter of law, that Strain and McPherson were acting as agents of A & P and not for their own independent purposes.

The effect of the trial court's instruction was to relieve A & P of responsibility for the acts of its agents. Thus,

even if the jury had determined that there had been a conspiracy to defraud the Tribe, it was left with the option to return a verdict for A & P. To allow this error to go unnoticed and uncorrected would result in a plain miscarriage of justice. The instruction should not be given at a re-trial.

c. The Aggravated Injury Instruction

In its charge to the jury the trial court gave Instruction No. 24 which provided as follows:

> One who seeks recovery for breach of warranty may not recover for damages proximately caused by his use of a product which occurred after he obtained knowledge of the defect or condition, which he claims constituted a breach of warranty, unless you find that under the particular circumstances a person of ordinary prudence would have used the product despite knowledge of such defect or condition.
>
> Nor may a party recover for injuries proximately caused by . . . use of the product which occurred after such defect could have been discovered . . . in the exercise of ordinary care, unless you find that under the circumstances a person of ordinary prudence would have used the product.
>
> However, a party may recover for injuries proximately caused by a breach of warranty before the defect or condition constituting the breach was discovered or could have been discovered . . . in the exercise of ordinary care.

The Tribe contends that the trial court erred by giving this instruction. We agree.

This instruction mirrors *South Dakota Pattern Jury Instruction* No. 150.27. As such, the instruction is a correct statement of the law in South Dakota. Nevertheless, for several reasons the instruction was inapplicable to the facts of this case.

First, the parties specifically addressed this issue in the contract. Provision Number 26 in the contract provided that the Tribe was free to use the irrigation systems despite defects. It also provided that A & P would be responsible for any damage that resulted from defects in the systems.[8] Common sense supports the rationale behind this provision. There was no way to know if any of the systems were defective unless and until they were used. Further, continuous use may have been necessary in order to detect defects.

Second, even if this instruction is proper, it was not proper at a trial where only liability was in issue. This instruction goes to the issue of damages. Third, the issue to which this instruction was addressd was covered adequately, and more concisely, by other jury instructions.[9]

Finally, we think this instruction was repetitious and that it placed undue emphasis on a matter favorable to A & P's case. In the past, we have noted that these charac-

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[8] Proivision Number 26 was a general guarantee. Specifically, it provided:

> Neither the final certificate of payment nor any provision in the contract documents nor partial or entire occupancy of the premises by [the Tribe] shall constitute acceptance of work not done in accordance with the contract documents or relieve [A & P] of liability in respect to any express warranties or responsibility for faulty materials or [work]. [A & P] shall remedy any defects in the work and pay for any damage to other work resulting therefrom, which shall appear within a period of one year from the date of final acceptance of work unless a longer period is specified. [The Tribe] will give notice of observed defects with reasonable promptness.

[9] In as much as these other instructions also go to the issue of damages and not the issue of liability there is some question as to the property of the instructions on remand. When a trial is bifurcated along the lines of these issues, jury instructions should be tailored narrowly according to the appropriate phase of the trial.

teristics may be sufficient to warrant reversal. *Dobson* v. *Bacon Transp. Co.*, 607 F.2d 805, 807-08 (8th Cir. 1979); *Flentie* v. *American Comminity Stores Corp.*, 389 F.2d 80, 83 (8th Cir. 1968). Our disposition of this case makes a ruling on the prejudicial effect of the instruction unnecessary. However, the instruction should not be given at a re-trial.

d. The Issue Of "Release".

On June 29, 1978, the Tribal Council passed a resolution which provided that "sign-offs" on the irrigation systems were to be suspended until an investigation into allegations of fraud had been made. Driving Hawk, as president of the Tribe, presided over this meeting. Nevertheless, Driving Hawk did not suspend execution of the sign-offs which were being completed by Eddie Farmer Farmer began making sign-offs on June 6, 1978, and had finished them by July 5, 1978.

A & P argues that these sign-offs acted to release A & P from all liability under the contract. The trial court submitted the task of determining the validity of these sign-offs as "releases" to the jury. The Tribe contends that it was error to submit the issue to the jury. We agree.

A release is a writing which provides that a duty owed to the maker of the release is discharged immediately or on the occurrence of the condition. *Restatement (Second) of Contracts* § 284 (1979). Given this definition and a review of the contract, it is clear that neither party originally intended the sign-offs to act as a release from liability.

Provision Number 17 of the contract provides, in pertinent part, as follows:

> As each irrigation "project" or system is completed by [A & P] and inspected by [the Tribe] and found to

> be satisfactorily completed and in working order, [the Tribe] shall make payment to [A & P] for the complete system less ten percent *10%) retainage.
>
> All material and work covered by partial payments made shall thereupon become the sole property of [the Tribe], but this provision shall not be construed as relieving [A & P] from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of [the Tribe] to require fulfillment of all the terms of the contract. . . .
>
> . . . .
>
> If, after 50 percent . . . of the work has been completed, [the Tribe] determines that [A & P's] performance and progress are satisfactory, [the Tribe] may make the remaining payments in full for the work subsequently completed but shall hold back the amounts already retained. *The amounts retained shall not be released by [the Tribe] until 30 days after the issuance of FINAL CERTIFICATE OF COMPLETION, which establishes that the project is totally complete.*

(emphasis added). "The interpretation and construction of written contracts are matters of law within the competence of Courts of Appeal to review." *Standard Title Ins. Co.* v. *Union Pac, Ins. Co.*, 364 F.2d 287, 289 (8th Cir. 1966).

> Basic to contract interpretation are the principles that the writing is read as a whole and interpreted in a way that will give effect to its general purpose, and an interpretation which makes the contract valid and reasonable will be preferred to that which would make it void or meaningless. . . . And in releases as in other contracts, the intent of the parties as expressed in the document and in light of the circumstances, should be given effect. (citations omitted)

American Commercial Lines, Inc. v. *Valley Line Co.*, 529 F.2d 921, 925 (8th Cir. 1976).

The language of the contract indicates that the parties contemplated partial acceptance as the project progressed, but that total acceptance would be contingent upon fulfillment of the contract terms and the issuance of a certificate of completion. The Tribe never issued a certificate of completion. In other words, the Tribe could have issued a partial acceptance of each individual system, and still have held A & P to the terms of the contract.

It is clear from the record that the sign-offs did not have significance independent of the contract. Farmer made the sign-offs between June 6 and July 5, 1978. The Tribal Council voted to suspend all sign-offs at its meeting on June 29, 1978. The only reason sign-offs would have been made before the June 29 meeting is because they represented the partial acceptances reflected in Provision Number 17 in the contract. Further, it would not have made any sense for the Tribal Council to suspend the remaining sign-offs unless they drew their significance from the language of the contract.

In short, the sign-offs were made pursuant to the contract not in spite of the contract. The sign-offs did not constitute a release of liability; they represented partial acceptance of A & P's performance. Under this interpretation, it was error to submit the issue of release to the jury.

e. Lone Dog's Unavailability As A Witness.

The Tribe subpoenaed Lone Dog as a witness for trial. A & P objected on the ground that Lone Dog intended to invoke the Fifth Amendment. The trial court sustained this objection. Later, A & P tried to read Lone Dog's deposition into evidence. The Tribe objected claiming

that Lone Dog should have been called to the stand. However, because Lone Dog revealed that he still intended to invoke the Fifth Amendment, the trial court ruled that he was an "unavailable" witness. *See Fed. R. Evid.* 804(a)(1); *Fed. R. Civ. P.* 32 (a)(3). The Tribe contends that it should have been allowed to call Lone Dog to the stand despite his intention to invoke the Fifth Amendment. Given the circumstances presented by this case, we agree.

In *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964), Justice Goldberg eloquently summarized the rationales behind the purposes served by the Fifth Amendment.

> The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to submit those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown . . . and by requiring the government in its contest with the individual to shoulder the entire load"; . . . our respect for the inviolability of the human personality; . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a "shelter to the guilty," is often a "protection to the innocent."

Id. at 55 (citations omitted). *See* Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1083-87 (1982).

In a criminal case, the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is

evidence of guilt." *Griffin* v. *California*, 380 U.S. 609, 615 (1965). To allow otherwise would make an individual's assertion of the privilege costly. *Id.* at 614. Courts are under a mandate to accord "liberal construction" to the Fifth Amendment in "favor of the right it was intended to secure"—the right against self-incrimination. *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951).

Nevertheless, the Supreme Court has recognized that the law of privileges tends to suppress the truth. As a result, privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify . . . has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Trammel* v. *United States*, 445 U.S. 40, 50 (1980), *quoting*, *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurther, J., dissenting). More significantly, the Supreme Court also has recognized that, in determining whether inferences may be drawn from the invocation of the Fifth Amendment, there is a distinction between civil and criminal cases. *See Baxter* v. *Palmigiano*, 425 U.S. 308, 316-18 (1976); *see also id.* at 335, (Brennan, J., dissenting). Indeed, one commentator has noted that "[i]n civil litigation between private parties, current Fifth Amendment jurisprudence sacrifices the determination of truth, the policies underlying liberal discovery, and the vindication of public and private rights to an extent rarely appreciated." Heidt, *The Conjurer's Circle*, 91 Yale L. J. at 1064.[10]

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[10] Professor Heidt's article deals with the problem of corporate defendants who invoke the Fifth Amendment during discovery in anti-trust suits. However, the Professor's analysis may be generalized and applied here where a non-party witness invokes the Fifth Amendment when subpoenaed for trial.

In part, policies underlying the Fifth Amendment are directed at diminishing the force which can be brought to bear upon an individual by the government. *See Murphy*, 378 U.S. at 55; *Baxter*, 425 U.S. at 335 (Brennan, J., dissenting). In other words, the Fifth Amendment is necessary to protect criminal suspects from governmental coercion in the government's attempt to obtain criminal confessions. However, in "a private civil action . . . the government lacks any opportunity for coercion, and this policy simply does not operate." Heidt, *The Conjurer's Circle*, Yale L. J. at 1084; *see Garner* v. *United States*, 424 U.S. 648, 655-56 (1976). ([The adversary system] is undermined when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures. In areas where government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings.") *See also Baxter*, 425 U.S. at 335 (Brennan, J., dissenting).

The Amendment also reflects the policy of "fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown and . . . by requiring the government . . . to shoulder the entire load' " in establishing an individual's guilt. *Murphy*, 378 U.S. at 55. However, only if the privilege is eliminated in civil cases will this balance be shifted. Allowing the jury to draw an inference from a witness' invocation of the Fifth Amendment does not affect the balance. Indeed, the Supreme Court has held that the Fifth Amendment does not preclude an adverse inference when the privilege is claimed by a party to a civil case. *Baxter*, 425 U.S. at 318; *id.* at 334 (Brennan, J., dissenting). The policies supporting the Fifth Amendment apply with even less force when a non-party witness

testifies in a civil proceeding and thus, the Amendment should not work to preclude an adverse inference in this situation.

Finally, there is embodied in the Amendment the concern with submitting any individual to the "cruel trilemma of self-accusation, perjury or contempt . . ." *Murphy*, 378 U.S. at 55. However, because the cruelty of being forced to increase one's criminal exposure is what the privilege is concerned with, retaining the availability of the privilege in civil cases and simply allowing he jury to draw an adverse inference from its invocation neither jeopardizes the privilege nor the witness. *See generally*, Heidt, *The Conjurer's Circle*, 91 Yale L. J. at 1062-1135.

We conclude that, under certain circumstances, a party may call a witness to the stand even when that witness has made known an intention to invoke the Fifth Amendment. We find support for this conclusion in the codification of the privilege in *Fed. R. Evid.* 501.[11] As the Supreme Court has noted:

> In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis" . . . and to leave the door open to change.

Trammel, 445 U.S. at 47. In addition, some states have adopted the approach we adopt today, 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 513[03] at 513-9, 513-10, and finally, the Second Circuit has recently adopted this approach in a case similar to the case before us.

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[11] For a detailed analysis of Rule 501's history, the Advisory Committee Notes, and the variations on the Rule adopted in several states *see* 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 513[01]-513[03].

Brinks, Inc. v. *City of New York*, 717 F.2d 700 (2d Cir. 1983).[12]

Having reached this conclusion we now apply it to the circumstances of the case before us. Lone Dog was a principal actor in a situation fraught with fraud. He was involved in an alleged, triangular conspiracy between A & P, Strain, and officers of the Tribe. There is a more significant consideration, however. Even though it was the Tribe which initially called Lone Dog as a witness, Lone Dog was really A & P's witness. By introducing into evidence Lone Dog's favorable deposition testimony, A & P made Lone Dog its principal witness and, simultaneously, effectively precluded the opportunity for cross-examination. Further, even though the grand jury testimony has increased the likelihood that the deposition testimony was perjured, from the court's point of view the evidence presented at trial by the Tribe was sufficient

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[12] *Brinks* also involved the propriety of non-party witnesses invoking the Fifth Amendment. Brinks had a contract with the City to collect money from parking meters. Some of Brinks' employees were stealing money from the meters. After the employees were arrested the City suspended and then cancelled the contract. Brinks sued the City for breach of contract; the City counterclaimed on grounds of breach and negligence. *Brinks*, 717 F.2d at 702-04.

At trial, the City called the guilty ex-employees as witnesses, even though it was aware that these witnesses intended to invoke the Fifth Amendment. In response to Brink's objection, the trial court ruled that the witnesses would be called and questioned; their refusal to answer on Fifth Amendment grounds was competent and admissible evidence. The trial court also allowed counsel for the City to argue that the ex-employees' reliance on the Fifth Amendment was circumstantial evidence in support of the City's claim. Finally, the trial court specifically instructed the jury on the issue stating that an adverse inference against Brinks was permissible. *Id.* at 707. The Court of Appeals agreed with the trial court's rulings and affirmed the verdict. *Id.* at 710; *but see id.* at 715 (Winter, J., dissenting).

to cast considerable doubt on the truth of Lone Dog's deposition. Yet this evidence, by itself, could not have overcome the weight or significance the deposition testimony would have had with the jury. Once the deposition was allowed into evidene, it was necessary to allow the Tribe to call Lone Dog as a witness in order to offset the unfair advantage A & P gained by being allowed to use the deposition.

The Federal Rules of Evidence and the Federal Rules of Civil Procedure were enacted in order to secure fairness in the administration of justice; to guarantee that the truth would be ascertained and proceedings would be determined justly. *Fed. R. Evid.* 102. *See Fed R. Civ. P.* 1. These rules were not designed to be manipulated unfairly, by any party in a legal proceeding, so as to obscure the truth. Yet to allow A & P to have Lone Dog rendered unavailable as a witness and then read his deposition into evidence, achieved just that: an unfair manipulation of the rules of evidence and procedure, which succeeded in obscuring the truth. This misuse of rules designed to assist in the struggle for justice cannot, and will not, be tolerated. While truth may be a goal which only can be obtained imperfectly, it is nonetheless one to which courts of law constantly must aspire.

We recognize that our decisions in *Holt* v. *Wyrick*, 649 F.2d 543, 548 (8th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) and *Witham* v. *Mabry*, 596 F.2d 293, 297 (8th Cir. 1979), held that an invocation of the Fifth Amendment renders a witness "unavailable" under *Fed. R. Evid.* 804(a)(1). Our decision today is consistent with *Holt* and *Witham*. Those cases were criminal prosecutions, and this case involves a civil matter between two private parties. Further, we are not declaring a bright-line rule for use in all civil cases. We simply are holding that given

the circumstances presented in this case the Tribe should have been allowed to call Lone Dog as a witness.

III. CONCLUSION

We reverse the district court's denial of the Rule 60(b) motion for a new trial. Lone Dog's admission of perjury before the grand jury was new evidence which could not have been discovered for trial or in time to move for a new trial pursuant to *Fed. R. Civ. P.* 59(b), which was material, and which probably would have produced a different verdict had it been heard by a jury. In reversing, we hold that the trial court erred in giving instruction No. 10 on agency and instruction No. 24 on aggravated injury. These instructions should not be given upon retrial. We also hold that it was error to submit the issue of release to the jury. Finally, we hold that the Tribe should have been allowed to call Lone Dog to the stand for purposes of cross-examination. Accordingly, this case is reversed and remanded for a new trial consistent with this opinion.

Costs assessed against Appellee.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
SEPTEMBER TERM 1983

No. 82-2187/2217/83-1748-SD

CHARLES COLOMBO; ETC
ROSEBUD SIOUX TRIBE,
Appellant/Cross Appellee,

v.

A & P STEEL, INC.,
Appellee/Cross Appellant.

Appeals from the United States District Court for the District of South Dakota

The Court, having considered appellee/cross appellant's petition for panel rehearing, or in the alternative, petition for rehearing en banc and being now fully advised in the premises, hereby orders the petition for panel rehearing, or in the alternative, petition for rehearing en banc denied.

June 4, 1984